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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL FOOTBALL LEAGUE, *et al.*,

Petitioners,

—against—

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Does an internal management decision of the governing body of the National Football League (the "NFL") which defines the qualifications for controlling ownership in an NFL team (and for consequent membership in the NFL's governing body) to exclude from membership persons who act simultaneously as owners and managers of a competing professional sports league constitute an illegal contract, combination or conspiracy in restraint of trade under Section 1 of the Sherman Act?

2. May an antitrust product market or submarket—described by the court below as consisting of "sports ownership capital"—be defined (i) without regard for product substitutes and (ii) instead according to "distinct characteristics" of individual *sellers*, without regard for whether the *product* whose trade allegedly is restrained has any distinct characteristics?

3. May market foreclosure, as a form of antitrust injury, be held unlawful without regard for either the share of the market allegedly foreclosed or any actual impact on competitive conditions?

4. Under the Rule of Reason, do antitrust defendants bear the burden of proving the *absence* of "less restrictive alternatives" to an alleged restraint of trade?

Parties Below

The parties to the proceedings below as of the time of trial are set forth in the margin.* Certain plaintiffs-respondents have since ceased operations.

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* **Plaintiffs-Respondents:** North American Soccer League; Orange County Pro Soccer (California Surf); Chicago World Soccer Inc. (Chicago Sting); Atlanta Professional Soccer, Ltd. (Atlanta Chiefs); Michigan Soccer, Limited (Detroit Express); Houston Professional Soccer Club, Inc. (Houston Hurricane); Aztecs Professional Soccer Club (Los Angeles Aztecs); Memphis Rogues, Ltd. (Memphis Rogues); Minnesota Soccer, Inc. (Minnesota Kicks); Lipton Professional Soccer, Inc. (New England Tea Men); Cosmos Soccer Club, Inc. (New York Cosmos); Edmonton NASL Soccer Enterprises, Ltd. (Edmonton Drillers); Philadelphia Soccer Associates (Philadelphia Fury); Louisiana-Pacific Corporation (Portland Timbers); Blue & Gold Limited (Rochester Lancers); San Diego Professional Soccer Club, Inc. (San Diego Sockers); San Jose Earthquakes Limited (San Jose Earthquakes); Tampa Bay Soccer Club, Inc. (Tampa Bay Rowdies); Prosoccer Limited (Toronto Blizzard); Tulsa Roughnecks, Ltd. (Tulsa Roughnecks); Vancouver Professional Soccer Club, Ltd. (Vancouver Whitecaps); and MSG Soccer, Inc. (Washington Diplomats).

Defendants-Petitioners: National Football League; The Five Smiths, Inc. (Atlanta Falcons); Baltimore Football Club, Inc. (Baltimore Colts); Buffalo Bills, Inc. (Buffalo Bills); Cincinnati Bengals, Inc. (Cincinnati Bengals); Cleveland Browns, Inc. (Cleveland Browns); Dallas Cowboys Football Club, Inc. (Dallas Cowboys); Rocky Mountain Empire Sports, Inc. (succeeded since trial by E.F.K. Sports, Ltd.) (Denver Broncos); The Detroit Lions, Inc. (Detroit Lions); Green Bay Packers, Inc. (Green Bay Packers); Los Angeles Rams Football Company (Los Angeles Rams); Minnesota Vikings Football Club, Inc. (Minnesota Vikings); New England Patriots Football Club, Inc. (New England Patriots); New Orleans Saints Louisiana Partnership (New Orleans Saints); New York Football Club, Inc. (New York Giants); New York Jets Football Club, Inc. (New York Jets); Oakland Raiders, Ltd. (Oakland Raiders); The Philadelphia Eagles (Philadelphia Eagles); Pittsburgh Steelers Sports, Inc. (Pittsburgh Steelers); St. Louis Cardinals Football Co. (St. Louis Cardinals); Chargers Football Company (San Diego Chargers); San Francisco Forty-Niners, Ltd. (San Francisco 49ers); Tampa Bay Area NFL Football, Inc. (Tampa Bay Buccaneers); and Pro-Football, Inc. (Washington Redskins).

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-

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Petitioners,

—against—

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The National Football League and those of its component teams named as parties to this action (collectively, the "NFL") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals is reported at 670 F.2d 1249 and appears in Appendix A hereto. The opinion of the District Court is reported at 505 F. Supp. 659 and appears in Appendix B hereto.

Basis of Jurisdiction

The judgment of the Court of Appeals is dated January 27, 1982 and was entered on January 26, 1982. A petition for rehearing was filed on February 10, 1982 and was

denied on March 17, 1982. The Order denying rehearing appears in Appendix C hereto. Jurisdiction in this Court exists pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was founded upon 28 U.S.C. §§ 1331 and 1337.

Statute Involved

This case involves a single statute, 15 U.S.C. § 1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Statement of the Case

This action was brought in 1978 by the North American Soccer League and certain of its then member clubs (collectively, the "NASL") to challenge the validity of a proposed NFL constitution and by-law provision which undertook to put teeth into a long-standing league policy prohibiting "controlling" owners[1] and chief managing of-

[1] For purposes of this case, and as used in this petition, "controlling" NFL club owners are those described in proposed § 9.4(A) of the NFL Constitution and By-Laws. *See* 670 F.2d at 1255 (Appendix A at 12a).

ficers of NFL clubs from maintaining conflicting ownership roles in other major sports leagues, including (but not limited to) the NASL. The complaint, brought under § 1 of the Sherman Act, 15 U.S.C. § 1, sought damages and an injunction against enforcement of the challenged provision, both in general and particularly insofar as it would have compelled two individuals, Mr. Lamar Hunt and Mr. Joseph Robbie, to divest themselves within a fixed time of either their NFL or their NASL ownership interests.[2]

The NFL's proposed by-law was challenged as a group boycott, allegedly illegal *per se*, and as an otherwise unreasonable restraint of trade among horizontal competitors. The District Court found no merit to the NASL's claims and entered judgment for the NFL. It held, first, that in determining ownership conflict of interest requirements (here involving a directly competing league) the NFL and its constituent clubs had acted as a single economic entity and thus had not contracted, combined or conspired with other relevant actors within the meaning of § 1 of the Sherman Act. 505 F. Supp. at 691 (Appendix B at 101a). Second, and irrespective of whether a plurality of actors existed for § 1 purposes, the District Court held that the NASL failed to prove the existence of any product market in which the proposed NFL by-law would operate to restrain trade in any material way. 505 F. Supp. at 683 (Appendix B at 82a).

The NASL appealed to the Court of Appeals for the Second Circuit, which reversed both of the District Court's holdings. The Court of Appeals noted that the sports league relationship involves a high degree of economic and business

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[2] Mr. Hunt at the time was a controlling owner of both the NFL Kansas City Chiefs and the NASL Dallas Tornado. Mr. Robbie and his wife together control the NFL Miami Dolphins and the NASL Fort Lauderdale Strikers.

interdependence, 670 F.2d at 1251, 1253 (Appendix A at 4a, 7a), and that damage to any club can adversely affect the stability, success and operations of the entire league. It nevertheless found, despite the NFL's sharing of 90 to 95 percent of league revenues on a 50-50 or 60-40 basis, that "the financial performance of each team, while related to that of the others, does not . . . *necessarily* rise or fall with that of the others." 670 F.2d at 1252 (Appendix A at 5a; emphasis added). On this reasoning, the Court of Appeals held that the league relationship should be disregarded and that the proposed NFL by-law in issue represented a Sherman Act conspiracy among separate business enterprises which would have the effect of damaging the competing NASL.

The Court of Appeals also found that "the record disclose[d] a separate market for sports capital and skill," 670 F.2d at 1260 (Appendix A at 24a), said to consist of capital possessed by "investor[s who] . . . must measure up to a profile having certain characteristics," as distinct from capital possessed by "financiers of the type prevailing in most business markets." *Id.* at 1260, 1253 (Appendix A at 25a, 8a). Within this "market," the Court of Appeals held that the NFL had "restrain[ed] at least some NASL teams from competing effectively against NFL teams," *id.* at 1259 (Appendix A at 22a), because enforcement of the NFL's proposed league rules against cross-ownership and interlocking directorates between competing leagues "would foreclose NASL's teams from continued enjoyment of and access to a significant segment of the market supply of sports capital and skill. . . ." *Id.*

Although noting that the "restraint involved here" might be viewed as "[v]ertical" in nature between the single entity NFL and its "owners," *id.* at 1258 n.5 (Appen-

dix A at 18a-19a), the Court of Appeals did not refer to any of this Court's decisions concerning vertical market foreclosure and instead stated the applicable law as follows:

> [T]he Sherman Act . . . does not require proof of the precise boundaries of the sports capital market or the exact percentage foreclosed; it is sufficient to establish, as was done here, the general outlines of a separate submarket of the capital market and that the foreclosed portion of it was likely to be significant.

Id. at 1261 (Appendix A at 26a). Having thus presumed that a "likely" foreclosure, of unstated size, within the "general outlines" of an otherwise undefined "sports capital" market, had effected a "significant" restraint of trade, the Court of Appeals then "balanced" the "anticompetitive effects" thus presumed against the procompetitive effects of the proposed NFL by-law.

In striking this balance, the Court of Appeals held that the NFL was "required to come forward with proof that any legitimate purposes [for its league rule] could not be achieved through less restrictive means." *Id.* at 1261 (Appendix A at 26a). The Court of Appeals found that the NFL had failed to prove this negative. *Id.* The NFL's remaining contentions were dismissed as "not substantial and . . . clearly outweighed by [the proposed rule's] . . . anticompetitive purpose and effect." *Id.* (Appendix A at 27a).

The Court of Appeals accordingly held that the proposed NFL cross-ownership provision unreasonably restrained trade in violation of § 1 of the Sherman Act and reversed with instructions to enter a permanent injunction against its enforcement. 670 F.2d at 1262 (Appendix A at 28a). The NFL filed a timely petition for rehearing, which was denied on March 17, 1982.

ARGUMENT

The Court of Appeals held that the NFL may not divorce itself from and compete unreservedly with the NASL, but instead must curb the competition in order to help a smaller competitor. The NFL believes that this decision is at variance with core antitrust decisions of this Court and also with common sense.

This appears to be the first judicial decision in which a court has overturned as *anti*competitive a rule *preventing* the common ownership of horizontal competitors. Although the parties stipulated that "[t]he primary economic competition involving professional sports leagues occurs between and among the competing leagues," 505 F. Supp. at 674 (Appendix B at 60a-61a), rather than between individual teams, the Court of Appeals disregarded the principal competitive arena and looked to the teams individually in finding an unlawful combination and conspiracy. 670 F.2d at 1257 (Appendix A at 18a). It thus rejected the NFL's argument that, as in those cases where no conspiracy is found in joint actions by parents and subsidiaries, Sherman Act "persons" must be separate economic entities. In this case, as the District Court correctly held and the parties themselves agreed, the relevant economic entities are leagues, not teams.

The decision below departs completely from the cardinal antitrust principle, reflected in congressional mandates against business combinations, that competitors must be separate and independent of one another. Instead, it requires the NFL to subsidize and strengthen teams in a directly competing league by permitting such teams to be purchased by the NFL's own controlling owners. This court-approved combination of competing sports leagues,

which are avowed horizontal competitors, perverts both the letter and spirit of the Sherman Act.

In addition, the Court of Appeals found an unreasonable restraint of trade in a product—investment capital—which the soccer league conceded to be "fungible." This holding was based upon the court's *de novo* finding that the NFL by-law, if adopted, would effect a "market foreclosure" of unstated dimension and as to which the NFL purportedly had not "come forward with proof" of the unavailability of "less restrictive means." 670 F.2d at 1261 (Appendix A at 26a).

If allowed to stand, the holding below would mean that the antitrust "Rule of Reason" is designed to protect business competitors rather than promote business competition and that internal decisions of sports leagues directed at ending conflicts of interest and assuring free and open competition constitute antitrust violations because the NFL has failed to prove a negative: that its "legitimate purposes could not be achieved through less restrictive means." *Id.*

I.

The Court of Appeals Evaluated the Internal Decisions of a Professional Sports League According to Entirely Inappropriate Legal Standards.

The application to professional sports leagues of legal rules, including antitrust principles, which were developed in business contexts entirely foreign to the sports league business relationship, has created virtual judicial havoc: each court acts as a mini-legislature, free to develop entirely new standards of antitrust review for the case before it. Thirty years of antitrust history have demonstrated that the federal courts are unable to cope with the sports league structural issue in the absence of more definitive guidelines.

The NFL respectfully submits that the time has come for direction from this Court.[3]

Although this Court has had occasion periodically to consider *whether* the antitrust laws apply to professional sports leagues,[4] the Court never has addressed the issue of *how* the antitrust laws should apply to their internal decision making. Lower courts have groped in vain for precedential

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[3] In the recent words of one commentator, the relation of professional sports to the antitrust laws "cries out for clarification," and the absence of predictable principles puts "an unfair burden on this industry." L. KOPPETT, SPORTS ILLUSION, SPORTS REALITY 282 (1981). The problem has been building for some time. Eleven years ago, former U.S. Solicitor General Robert Bork concluded that this Court ultimately would have to reconcile sports league structure with antitrust doctrine:

> There are some activities . . . which could not exist at all without the restraint and these should be lawful no matter what the market share of the parties. A prime example is league sports . . . . Sooner or later the [Supreme] Court is going to have to face the issues raised by the restraints in organized sports, and this solution [agreements permitted within a single league] seems to me dictated by the needs of leagues and by the analogy of the league to partnerships or firms." Bork, *Resolved: Present Antitrust Restraints on Pricing Should be Relaxed*, 41 A.B.A. ANTITRUST L.J. 5, 13 (1971).

See also Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST 211, 233 (1959); SENATE COMM. ON THE JUDICIARY, APPLICABILITY OF THE ANTITRUST LAWS TO CERTAIN ASPECTS OF DESIGNATED ORGANIZED PROFESSIONAL TEAM SPORTS, S. REP. No. 1303, 88th Cong. 2d Sess. 6 (1964); *NFL Option Contracts and Common Player Draft Will Not Be Examined by Justice*, [Jan.-June] *Antitrust & Trade Reg. Rep.* (BNA) No. 405 (Apr. 15, 1969) (response of former Assistant Attorney General Richard W. McLaren to Rep. William T. Cahill (R-N.J.)); Note, *The N.F.L.'s Final Victory Over Smith* v. *Pro-Football, Inc.: Single Entity-Interleague Economic Analysis*, 27 CLEV. ST. L. REV. 541 (1978).

[4] *See Flood* v. *Kuhn*, 405 U.S. 258 (1972); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *United States* v. *International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200 (1922).

guidance, only to invoke inappropriate antitrust principles designed for horizontal business competitors and their trade associations.

Professional sports leagues do not represent a form of "cooperation" among otherwise independent business competitors. Nor are they joint ventures formed as a matter of discretion for purposes of improving the marketing of separately produced products or promoting greater efficiency among competitors in an industry. On the contrary, they are joint producers of a single common entertainment product. While the operating units of the league are separate organizations in form, they typically are created by the league in the first instance, can have no independent existence outside their league, and as a general matter are not economic competitors of one another.[5]

On the playing field, the teams are intensely competitive —and every effort is made to preserve and sharpen that competition. But in producing and marketing the league product, which for the National Football League is uniformly high quality football presented in the format of an annual seasonal race, the clubs necessarily are co-producers and co-sellers, not competitors. They are functionally incapable of operating independently. They act as partners in a common business enterprise, bound in a symbiotic relationship without parallel anywhere else in American business.[6]

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[5] *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).

[6] As the leading academic commentators on sports law have written,

> [T]here is a great deal of economic interdependence among the clubs comprising a league. They jointly produce a product which no one of them is capable of producing alone. In addi-

(footnote continued on following page)

Such an enterprise is obviously lawful. It is conceived as a method of making possible a particular form of entertainment product and presents no antitrust issues in its inception.

(footnote continued from preceding page)

tion, the success of the overall venture depends upon the financial stability of each club. [*See generally United States* v. *National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953); Bork, *Ancillary Restraints and the Sherman Act*, 15 ABA ANTITRUST SECTION 211, 231-34 (1959); Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1 (1964).] The members must, therefore, refrain from direct, interfirm economic competition and, in fact, do utilize various cross-subsidy devices to compensate for the natural inequities arising from differences in the economic potential of various franchise locations.

Since a league's member-clubs do not compete with one another, it seems inappropriate to make them subject to legal principles designed to control the behavior of firms which are fundamentally different. In its basic nature, a league-firm is not a conspiracy. To treat it as such is to force results which are unlikely to achieve any purpose intended by Congress.

This is not to say that a league's operation enjoys complete antitrust immunity. Rather, what it means is that we must select a different antitrust frame of reference for judging the league's conduct. J. WEISTART & C. LOWELL, LAW OF SPORTS § 5.11, at 757-58 (1979).

There are various types of national partnerships which present interesting analogies to sports leagues. One could imagine a large accounting firm organized as a partnership in which each of the partners contributed his own capital and in which the individual's economic return was influenced by both the output of the local offices which each controlled and the overall success of the business. Thus, there might be a general sharing in partnership receipts as well as a system for rewarding individual output. . . . Since competition among the firm's various offices is neither an intended nor a desirable goal of the particular form of business organization, there appears to be no reason to apply a rule of law which was designed to solve different problems. While the analogy between a sports league and a partnership is not a precise one, there is considerable similarity, and on the element which is most relevant here—mutual interest in cooperation, rather than competitive action—the comparison seems appropriate. *Id.* § 5.11, at 699-700 (footnotes omitted).

Sports leagues do not develop as methods of restraining trade, since only by venturing together can the clubs produce and market a product which otherwise would not exist. *Cf. Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 21-23 (1979). The NFL's product competes head-to-head with the products of other sports leagues and with other forms of entertainment in the highly competitive entertainment market. The operating principles of such lawful ventures, developed by agreement among the joint venturers themselves, should not be subject to *ad hoc* judicial review as though they were agreements and conspiracies among economically independent persons. *See United States* v. *Morgan*, 118 F. Supp. 621, 689-91 (S.D.N.Y. 1953).

Experience has shown, however, that the lower Federal courts have undertaken to accept or reject at will the "jointness" of a professional sports league venture without giving any effect to the inherent rights, privileges and business needs of the league relationship. Intraleague agreements, understandings and operating principles thus regularly are subjected to case-by-case Rule of Reason adjudications under either utterly inapposite standards or no identifiable standards whatever. A sampling of the decided cases illustrates the basic confusions, conflicts and irrationalities which permeate sports law:

—The NFL is "a *unique type of business*," not like an "ordinary business," and its clubs "must *not compete* too well with each other *in a business way*." *United States* v. *National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (emphasis added).

—The NFL is like any other business and "open *unfettered competition*" must take place among its clubs. *Bowman* v. *National Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975) (emphasis added).

—Professional baseball is "a single, unified but stratified organization." *Flood* v. *Kuhn*, 316 F. Supp. 271, 273 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

—The NFL is a "unique or novel" business organization having "*some* of the characteristics of a joint venture." *Mackey* v. *National Football League*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (emphasis in original).

—The NFL clubs "[l]ike any other organizations . . . are subject to the antitrust laws . . . the team-sport or joint-venture nature of their operations notwithstanding." *Smith* v. *Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

—The "*individual members*" of a professional basketball league are like a "private government." *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (emphasis added).

—Professional basketball clubs are "*joint venturers* . . . dependent upon one another as *partners*." *Levin* v. *National Basketball Association*, 385 F.Supp. 149, 150 (S.D.N.Y. 1974) (emphasis added).

—Professional basketball clubs operate in a "*common enterprise*" and a "*joint venture*." *Hawkins* v. *National Basketball Association*, 288 F. Supp. 614, 621 (W.D. Pa. 1968) (emphasis added).

—Professional hockey is "one single business enterprise." *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974).

—The NFL may properly be considered a "single economic entity." *North American Soccer League*

v. *National Football League*, 505 F. Supp. 659, 688 (S.D.N.Y. 1980) (Appendix B at 94a-95a), *rev'd in part*, 670 F.2d 1249 (2d Cir. 1982) (Appendix A).

—The NFL *is not* a "single business entity." *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 519 F. Supp. 581, 585 (C.D. Cal. 1981).

—The NFL teams "are not *competitors* in any economic sense. The clubs operate basically as a joint venture. . . ." *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1179 (D.C.Cir. 1978) (emphasis in original).

The decision below illustrates not only the antitrust confusion but also the anticompetitive results which follow from applying separate enterprise principles to internal professional sports league decisions and operating agreements. The Court of Appeals held that "NFL teams are separate economic entities engaged in a joint venture," 670 F.2d at 1252 (Appendix A at 5a), but attached no antitrust significance to that conclusion. The Court of Appeals offered no discussion of whether the challenged by-law was an "ancillary restraint" which was reasonable or inherent in joint venture terms. The basic antitrust principles prohibiting interlocking directorates among competing enterprises [7] were held to be irrelevant because the NFL is not

[7] The Court of Appeals expressly held that the NASL and the NFL were closely competitive, 670 F.2d at 1252 (Appendix A at 6a-7a), but applied that fact as a ground for challenging rather than justifying the NFL's proposed rule. The NFL and NASL had stipulated before trial, in several formulations, that the leagues are competitive and that the primary competition between the two is at the *league versus league* level:

(footnote continued on following page)

organized in "corporate" form. 670 F.2d at 1262 (Appendix A at 28a). The NFL was thus enjoined to stop "conspiring" with itself and to allow ownership affiliation by its key personnel with a directly competing league as a means of enabling the latter to compete "successfully" with the NFL. Sports leagues apparently now are free to "compete" by buying up one another's operating units in the interest of "efficiency" or "success."

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> The NASL and its member teams (whether organized in corporate or any other form) compete with the NFL and its member teams (whether organized in corporate or any other form) in interstate commerce. Such competition *exists primarily on an interleague basis.* NASL Proposed Finding No. 108, contained in the Pre-Trial Order (A385) at A496, Vol. II (emphasis added). (Citations in the form "A—" refer to the Joint Appendix filed with the Court of Appeals.)
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> • • •
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> The NASL and the NFL are two of the major professional sports leagues in the United States. Each is composed of member teams located throughout the United States (and, in the case of the NASL, in parts of Canada) which compete on the playing field with each other and also *operate jointly* to promote attendance at and fan interest in the games which they play and to create and market professional athletic entertainment events *in competition with other sports leagues* (and other producers and marketers of sports and other entertainment events). Agreed Finding of Fact No. 8, contained in the Pre-Trial Order (A385) at A392, Vol. II (emphasis added).
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> The NASL and NFL, along with the other major professional sports *leagues* in hockey, basketball and baseball, *compete with each other* in the entertainment industry. Agreed Finding of Fact No. 9, contained in the Pre-Trial Order (A385) at A392, Vol. II (emphasis added).
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> The NASL, the NFL and other major professional sports *leagues* all *compete* in interstate commerce for fan interest, media attention, advertising revenues and network television revenues. The primary 'products' sold to the public by the individual sports leagues and/or their member teams, includ-

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This perverse result arises from the combination of "intra-enterprise" conspiracy concepts [8] and Rule of Reason tests, developed in wholly unrelated business situations, in a way which ignores the sports league relationship entirely.

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> ing the NFL and NASL, are tickets for spectator viewing and the broadcast rights to games which the individual clubs play with other league members. Agreed Finding of Fact No. 10, contained in the Pre-Trial Order (A385) at A392-A393, Vol. II (emphasis added).
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> *Competition between the NASL and NFL* has grown over the past few years because of the similarity *between the two sports* and the overlaps between their seasons, their franchise locations and, in some cases, their stadiums. Agreed Finding of Fact No. 19, contained in the Pre-Trial Order (A385) at A397, Vol. II (emphasis added).
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> "The effectiveness of *competition* in the major professional team sports market thus depends on the level of rivalry *between* the five existing major *leagues*. . . ." Testimony of NASL expert witness Louis Guth at A524, Vol. II (emphasis added). When asked whether it is fair to say that the price competition in the professional team sports market occurs *between and among leagues* rather than between local teams in separate sports, Mr. Guth replied, "I think that is generally true and *specifically with regard to the issues in this proceeding it is true.*" Guth, Tr. 1897, Vol. XI of Joint Appendix (emphasis added).

[8] The problem of defining an enterprise for § 1 analysis is unsettled in many other business contexts, as well. The intracorporate conspiracy notion "is a doctrine with numerous critics and few friends." Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981). *See also* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661 (1982).

At least three Circuits—the Seventh, Eighth and Ninth—have adopted an "all the facts and circumstances" test at odds with the rigid rules of formally separate legal entities employed by the Second Circuit in the present case. *E.g., Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). *See generally* Handler & Smart, *supra*, at 55-61.

The NFL submits that this Court did not intend that cases such as *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), be applied in a fashion which transforms the recognized antitrust law applicable to joint ventures and business partnerships into a directive that their business decisions and operating policies be carried out in a manner which tends to encourage or promote the business success of their competitors—and which thereby denies them the right to compete openly in the marketplace pursuant to their own legitimate competitive business inerests.

It is the *process of competition* that the antitrust laws are designed to serve and not the protection of the business success of particular competitors; but the latter is the ruling here. The Court of Appeals held that the NFL is a "joint venture" of "separate economic entities," 670 F.2d at 1252 (Appendix A at 5a)—which is fundamentally true of any business joint venture or business partnership. Because it is an organization of that character, the Court of Appeals held that "conspiracy" principles can be applied. *Id.* at 1256-1258 (Appendix A at 16a-18a). Because "conspiracy" principles are applicable, the court reasoned, § 1 requires that sports league practices and internal agreements must be more pro-competitive than anti-competitive. *Id.* at 1259 (Appendix A at 21a-22a). But this was taken to mean that a sports league may not operate with any internal policies or competitive agreements which potentially handicap the business success of a competing league—*even where such policies tend to promote rather than limit business competition between the two leagues.* Under such a view of § 1, a sports league's decisions to enlarge its operations, to extend the length of its season, to make greater use of television, or to prevent conflicts of interest within its own

managing board all are open to challenge under § 1 on the ground that "conspiracy" has taken place which may disadvantage the league's business competitors.

This is not an *antitrust* principle; it is a regulatory principle.

A sports league, as a business competitor of other sports leagues and in the entertainment market generally, must comply with § 2 of the Sherman Act, 15 U.S.C. § 2. But no § 2 issues are presented by this case, for the NFL has no "monopoly" of investment capital or sports management skills, as the record below made clear. 505 F. Supp. at 665-66, 681-83 (Appendix B at 39a-42a, 78a-82a). By finding an anticompetitive motive in a procompetitive practice, the Court of Appeals in effect transformed the NASL's § 1 claim into a § 2 case despite the absence of the required elements of § 2. Rather than acknowledge this, the court made up a new § 1 principle apparently to be applied to all sports leagues, joint ventures, and group organizations: such enterprises, however valid in their inception, may not, in choosing their marketing techniques or pursuing their own business interests, arrive at any internal agreements which are inconsistent with the business interests of their competitors.

If each federal court confronted with a professional sports league antitrust issue is free to find a meaning for "procompetitive" and "anticompetitive" in this vagrant manner, litigation involving such practices will continue to multiply and irreconcilable results will abound. Particularly where the undisputed record reveals intense horizontal competition between the entertainment products of two rival sports league enterprises, an appellate court mandate that "combination" of those competitors is compelled by § 1 of the Sherman Act can create nothing but the most profound precedential mischief.

II.

The Court of Appeals Ignored This Court's Decisions Governing Sherman Act Market Definition and Measurement.

The NFL by-law at issue in this case "restrains," if anything, controlling NFL club owners' decisions concerning where they may invest their spare cash not already committed to the operation of their NFL clubs. This action was brought to enable certain controlling NFL club owners to invest their money in NASL teams. The Court of Appeals thus framed the substantive issue essentially as one of vertical market foreclosure, *i.e.*, whether the proposed NFL league rule would "foreclose" substantial sources of investment capital to NASL teams. But in imputing antitrust significance to this alleged foreclosure, the Court of Appeals departed from the teachings of this Court.

A. Sherman Act Product Markets Must Be Defined According to Product Characteristics, Not Seller Characteristics.

The disputed NFL cross-ownership rule, like any conflict of interest provision, represents a form of exclusive dealing arrangement obliging controlling NFL club owners to refrain from purchasing NASL or other competing major league sports teams.[9] This Court has held that "an exclusive-dealing arrangement . . . does not violate the [antitrust laws] . . . unless the court believes it probable that performance of the contract will foreclose competition in a *substantial share* of the line of commerce affected." *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327

[9] *See* 670 F.2d at 1255 (Appendix A at 12a-13a) (quoting the rule at issue).

(1961) (emphasis added).[10] The first step in such an analysis, as the Court of Appeals recognized, "must be" to determine the relevant "line of commerce, *i.e.*, the type of goods, wares or merchandise, etc., involved . . . on the basis of the facts peculiar to the case." *Id.* (footnote omitted).

The NFL's proposed by-law, on its face, would "restrain" nothing but the movement of investment capital: money. *Cf. United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (the "credit market"). It is "capital investment" which the NASL purportedly seeks to unleash, 670 F.2d at 1255 (Appendix A at 13a), and "ownership interests" which the NFL's proposed league rule solely affects. *Id.* (Appendix A at 12a). But to avoid the obvious conclusion that a dollar is a dollar and "capital is fungible," [11] the Court of Appeals found that a distinct and separate "sports capital" submarket exists, whose "supply side" is made up of capital possessed by "individuals or businesses with distinct characteristics as distinguished from the much larger number of financiers of the type prevailing in most business markets." 670 F.2d at 1260, 1253 (Appendix A at 25a, 8a).

This finding, which the Court of Appeals concededly made *de novo*,[12] rested upon a striking departure from this

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[10] The holding of this Court in *Tampa Electric*, which was rendered under § 3 of the Clayton Act, applies *a fortiori* to claims bottomed upon § 1 of the Sherman Act. *See* 365 U.S. at 335; *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1239 (3d Cir. 1975).

[11] The NASL conceded this fact below. Reply Brief for Plaintiffs-Appellants-Cross-Appellees, at 14.

[12] *See* 670 F.2d at 1260 (Appendix A at 24a). In basing its decision upon facts found *de novo* at the appellate level, the Court of Appeals evidently—and improperly—assumed the "function of the District Court." *Schine Chain Theatres, Inc.* v. *United States*,

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Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). In *Brown Shoe*, the Court held that "submarkets may exist which, in themselves, constitute product markets for antitrust purposes," 370 U.S. at 325, and explained this holding as follows:

> The boundaries of . . . a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the *product's* peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. (footnote omitted) (emphasis added), *quoted at* 670 F.2d at 1260 (Appendix A at 24a). Contrary to the decision below, the quoted passage directs antitrust market definition to the characteristics of *products*, not *sellers*. Neither *Brown Shoe* nor any other antitrust decision of this Court permits a product "submarket" to be defined as limited to a plaintiff's preferred selection of sellers who offer an otherwise fungible commodity. Market definition turns not upon where an antitrust plaintiff arbitrarily *chooses* to look for supplies, but upon where such a person "*can practicably turn* for supplies." *Tampa Electric*, 365 U.S. at 327 (emphasis added). *See United States* v. *Connecticut National Bank*, 418 U.S. 656, 668 (1974).

The decision below contains no mention of where the NASL can practicably turn for supplies of investment

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334 U.S. 110, 124 (1948). Indeed, the District Court, after hearing all the evidence and closely observing many of the owners themselves, expressly found that "[t]he NASL has not proved that present sports owners have such peculiar characteristics as to justify constituting them a separate and distinct economic submarket." 505 F. Supp. at 683 (Appendix B at 82a).

capital, because the Court of Appeals instead defined the relevant "market" according to respondents' expressed subjective preferences among suppliers. In economists' terms, the market was defined as a single point on the supply curve rather than as the curve itself. If correct, this approach would compel the conclusion that any seller of anything, regardless of market share, can make up the "supply side" of a product "submarket" if it is unfortunate enough to have coloratively "distinct characteristics" which an antitrust plaintiff, for his own reasons, finds attractive. Nothing could be further removed from this Court's precedents concerning antitrust market definition, which uniformly call for factual analysis of *product* interchangeability. *See, e.g., United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957); *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

B. Market Foreclosure, as a Form of Antitrust Injury, Cannot Be Found Unlawful Without Regard To Market Size or Market Impact.

Perhaps because its market definition rested entirely upon facts found *de novo* at the appellate level, the Court of Appeals made no effort to express in numerical terms the volume of trade in "sports capital" which the NFL was held to have restrained. Compared with the rigorous analysis of this Court's prior cases,[13] the decision below is impressionistic at best: controlling NFL club owners, according to the Court of Appeals, "likely" supply a "significant portion" of the "sports capital market" 670 F.2d at 1260-61 (Appendix A at 25a-26a). A violation of § 1

[13] *See, e.g., Brown Shoe*, 370 U.S. at 328-35; *Tampa Electric*, 365 U.S. at 329-35; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 295-99, 309-14 (1949). *See also Fruehauf Corp.* v. *FTC*, 603 F. 2d 345, 352-61 (2d Cir. 1979); *Susser* v. *Carvel Corp.*, 332 F.2d 505, 514 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965).

of the Sherman Act, the NFL respectfully urges, cannot rest on so meager a foundation.

Had the Court of Appeals adhered to this Court's precedents, it would have analyzed the record to determine "the proportionate volume . . . as to which the challenged contract pre-empted competition," *Tampa Electric*, 365 U.S. at 333, and on that basis reached a conclusion whether the proposed NFL by-law would have been unlawful. The conspicuous absence in the opinion below of any market share data of any sort reflects the extent to which this Court's precedents were ignored by the Court of Appeals.[14]

"[T]he inquiry," under § 1 of the Sherman Act, "is confined to a consideration of impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). Market foreclosure can have such an impact only if it "deprive[s] . . . rivals of a fair opportunity to compete," *Brown Shoe*, 370 U.S. at 324 (quoting H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949)), in terms of the remaining supplies of the commodity affected. The decision below, however, rests upon no finding of actual or probable market effects. A finding of market impact could only have followed from a quantitative analysis of foreclosure which, despite this Court's decisions, the Court of Appeals deemed irrelevant: "it is sufficient to establish . . . the general outlines of a separate submarket of the capital market and that the foreclosed por-

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[14] Based upon undisputed facts in the record, even assuming the existence of an unrealistically limited "sports capital" market consisting solely of owners of professional sports teams, all of the NFL controlling owners—38 individuals—together comprised only 0.71% of the total number of owners of major league sports teams. This figure is strikingly close to that found in *Tampa Electric*, 0.77%, which this Court labeled "quite insubstantial." 365 U.S. at 333. *See* NFL Petition for Rehearing, at 9 (filed Feb. 10, 1982).

tion of it was likely to be significant." 670 F.2d at 1261 (Appendix A at 26a).

This holding is at war with this Court's decisions in *Professional Engineers* and *Tampa Electric*. It allows antitrust liabilities to be found irrespective of market consequences and announces a new and unexplained rule of foreclosure—"significant portion"—against which no contract could ever be safe from antitrust attack. *Compare Tampa Electric*, 365 U.S. at 329 (outlining the many determinants of whether a market foreclosure is "substantial").

III.

The Rule of Reason Cannot Require Antitrust Defendants to Disprove the Possibility of So-Called Less Restrictive Alternatives.

In evaluating the NFL's league ownership rules under the Rule of Reason, the Court of Appeals considered whether those rules "promote[d] competition or . . . suppress[ed] competition." 670 F.2d at 1259 (Appendix A at 21a) (quoting *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978)). In so doing, however, the court below adopted a new principle of decision: that the antitrust "reasonableness" of any internal league business decision requires that the defendants prove the *absence* of so-called less restrictive alternatives:

> [T]he NFL was required to come forward with proof that any legitimate purposes [underlying the proposed league by-law] could not be achieved through less restrictive means. This it has failed to do. The NFL, for instance, has shown no reason why it could not remedy any conflict of interest arising out of NFL-NASL competition for broadcast rights by re-

> moving cross-owners from its broadcast rights negotiating committee.

670 F.2d at 1261 (Appendix at 26a). This holding puts a defendant to an impossible standard of proof and conflicts with this Court's decision in *Professional Engineers* and with that of the Court of Appeals for the Third Circuit in *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975).[15]

The court below nowhere defined what it meant by "less restrictive means," although the concept presumably is similar to that which this Court has recognized in determining the permissibility of state trade "restraints" under the Commerce Clause. *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). But this

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[15] *American Motor Inns* considered a requirement that the defendant's motor inn franchisees hold no ownership interests in competing motor inn chains. 521 F.2d at 1236 n.3. To the plaintiff's contention that "less restrictive alternatives" existed to preserve the various purposes urged in support of the ownership restriction, the court held as follows:

> In its descriptions of the rule of reason inquiry, the Supreme Court has never indicated that, regardless of the other circumstances present, the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree . . . .
>
> Application of the rigid "no less restrictive alternative" test in cases such as this one would place an undue burden on the ordinary conduct of business. Entrepreneurs such as [defendant Holiday Inns, Inc.] would then be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide "adequate" protection for legitimate commercial interests.

521 F.2d at 1249-50 (footnote omitted).

Court's antitrust precedents—and simple logic—refute any supposition that an alleged restraint of trade cannot be "reasonable" under § 1 of the Sherman Act unless the defendants prove that their purposes *"could not* be achieved through less restrictive means." 670 F.2d at 1261 (Appendix A at 26a; emphasis added).

It is the purpose of antitrust remedies to preserve "the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain." *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 388 (1923). If that purpose is not impaired, if an alleged restraint does not exhibit an overall "monopolistic tendency," *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) (quoting *Standard Oil Co.* v. *United States*, 221 U.S. 1, 57 (1911)), then the purported existence of "less restrictive alternatives" is simply irrelevant: the Sherman Act prohibits restraints of trade, not alleged failures to create competition or advantages for competitors.

A "balance" of procompetitive and anticompetitive effects, as reflected in a factual record, can yield an overall favorable "impact on competitive conditions," *Professional Engineers*, 435 U.S. at 690, regardless of whether, under an ill-defined "less restrictive means" test, that impact could be still *more* favorable. The Rule of Reason lacks all reason if, regardless of demonstrated impact on competitive conditions, a violation of the Sherman Act could stand on the defendants' failure to anticipate and to *disprove* the efficacy of each and every "less restrictive alternative" which a plaintiff might imagine and suggest.

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

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